Supreme Court, U.S.
FILED
APR 15 1997
OFFICE OF THE CLERK

No. 96-1184

In The

Supreme Court of the United States

October Term, 1996

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH, III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

To the extent that respondents address the issue of whether this case warrants the Court's review (as opposed to disputing the allegations of plaintiffs' complaint or arguing the merits of the decision below),[1] they argue that certiorari should be denied because the case is unusual. Petitioners wholeheartedly agree that this case is unusual, but it is the *facts* of the case – not the legal principles at issue – that make it so. Indeed, the *facts* of this case are so egregious as to have prompted Senior Judge Shadur of the United States District Court for the Northern District of Illinois to describe the case as "the sort of Willie Horton of the class action." Milton I. Shadur, *The Unclassy Class Action*, Litig., Winter 1997, Vol. 23, No. 2, at 3.

What is not unusual about this case are the legal doctrines that the Seventh Circuit panel decision implicates and disrupts, legal doctrines that are important and recurring and that warrant this Court's consideration. The purpose of this reply is to show that, contrary to respondents' assertion, certiorari is warranted because this case

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[1] With respect to respondents' factual assertions, at this point petitioners wish only to respond specifically to the statement of respondents Edelman & Combs and Daniel A. Edelman that "[t]he Florida Attorney has proven to be such an embarrassment to petitioners that they have apparently taken the drastic step of terminating his role as their *amicus*." Edelman's Brief in Opposition, at 3. Contrary to respondents' statement, the Florida Attorney General, along with the Attorneys General of twenty-one other states, has filed a brief *amicus curiae* in this Court strongly supporting petitioners.

involves legal questions of enormous and widespread significance strongly meriting this Court's attention.

1. Certiorari is warranted to clarify the due process rights of class members.

This case raises fundamental issues involving the due process rights of class members. It has been over a decade since this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the only case in which this Court has addressed the prerequisites to a state court's exercise of jurisdiction over class members. And it has been half a century since this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), the only case in which this Court has addressed the remedies available to class members who are denied adequate representation in a class action.

Yet, during that same period of time, the class action device increasingly has become the remedy of choice for resolving broad issues involving hundreds of thousands of individuals in venues far removed from the forum in which the class action is pending. *See, e.g., General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (setting aside class action settlement involving plaintiff class of 650,000 owners of GM pick-up trucks with allegedly dangerous side-mounted gas tanks because notice was inadequate); *Judge OKs GM Settlement of Suit on Truck Gas Tanks*, Los Angeles Times, Dec. 28, 1996, at D2 (Louisiana state court approves class action settlement involving allegedly dangerous side-mounted gas tanks on 5.5 million GM trucks); Judith Evans, *Tennessee Judge Approves Plastic Pipe Settlement; Two Firms to Reimburse Homeowners $950 Million,*

Wash. Post, Nov. 10, 1995, at B1 (Tennessee state court approves class action settlement in case involving 6 million homeowners in 21 states for property damage caused by polybutylene water pipes).

Moreover, class actions almost invariably are being settled, not litigated, and settled, as here, on terms and in a manner that raise serious questions of compliance with the due process rights of the members of the class. *See Adams v. Robertson*, 117 S. Ct. 1028 (1997) (dismissing writ of certiorari as improvidently granted); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Products, Inc. v. Windsor*, 117 S. Ct. 379 (1996) (argued Feb. 18, 1997).

In view of the expanded use of state courts to resolve nationwide class actions in which the majority of class members lack minimum contacts with the forum state, this Court should grant the petition in order to address the important issues raised with respect to the rights of class members and the remedies available to them when those rights are violated.[2]

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[2] Respondents persist in asserting that petitioners could have opted out or objected to the settlement. But due process *also* requires adequacy of representation *and* of notice, both of which have been challenged by petitioners. (These challenges were *not* entertained below because of the misapplication of the *Rooker-Feldman* doctrine).

2. Certiorari is warranted to clarify the scope of the *Rooker-Feldman* doctrine.

This Court has had few occasions to address the *Rooker-Feldman* doctrine since its inception. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Yet courts and commentators have struggled with the doctrine. This case presents the ideal vehicle for the Court to address the question of the scope and application of the *Rooker-Feldman* doctrine, including:

a. Is the *Rooker-Feldman* doctrine co-extensive with res judicata? *See Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986) ("We have read *Rooker* . . . as an application of res judicata"). Or are the two doctrines not co-extensive, *see Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996) ("res judicata and the *Rooker-Feldman* doctrine 'are not co-extensive' "), or are they simply similar, *see Valenti v. Mitchell*, 962 F.2d 288, 297 (3d Cir. 1992) (*Rooker-Feldman* has a "close affinity to the principles embodied in the legal concepts of claim and issue preclusion"); *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 n.1 (8th Cir. 1995) (*Rooker-Feldman* and preclusion principles are "extremely similar")?

b. If the *Rooker-Feldman* doctrine and res judicata are co-extensive (or even "extremely similar"), what is the purpose of *Rooker-Feldman*? *See* Note, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of the Federal District Courts*, 42 Rutgers L. Rev. 859 (1990) (criticizing *Rooker-Feldman* as harmful to federal jurisdiction); Jack M. Beerman, *Government Official Torts and the Takings*

Clause: Federalism and State Sovereign Immunity, 68 B.U.L. Rev. 277, 341 (1988) (same); *Cross-Sound Ferry Services, Inc. v. I.C.C*, 934 F.2d 327, 343 (D.C. Cir. 1991) (Thomas, J., concurring) ("when determining the preclusive effect to which state-court judgments are entitled, the Court usually eschews the theory of *Rooker-Feldman* for the more conventional approach of simply applying the substantive preclusion law of the state"). *See also* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4469, at 663-68 (1981); Richard H. Fallon, et al., *Hart & Wechsler's The Federal Courts and the Federal System*, at 1503-04 (4th ed. 1996).

c. If the two doctrines are co-extensive, can the Seventh Circuit be correct that *Rooker-Feldman* bars a federal action that would not be barred under principles of res judicata because the prior state court judgment is not entitled to full faith and credit? *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Underwriters Nat. Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691 (1982).

d. If the two doctrines are *not* co-extensive, can the Seventh Circuit be correct that *Rooker-Feldman*, unlike res judicata, bars a federal action even if the prior state court judgment is not entitled to full faith and credit? *Compare GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993) (*Rooker-Feldman* doctrine "has nothing to do with" full faith and credit) *with Gauthier v. Continental Diving Services, Inc.*, 831 F.2d 559, 561 (5th Cir. 1987) ("*Rooker-Feldman* casts in jurisdictional terms a rule that is very similar if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment").

The lower courts need guidance as to the breadth and effect of the *Rooker-Feldman* doctrine; there is no uniformity in the emerging law. Without such guidance, *Rooker-Feldman* will continue to be applied in confusing and inconsistent ways. And it will be applied even to deny individuals like petitioners here access to the federal courts when the state court judgment was entered without personal jurisdiction, in violation of petitioners' constitutional due process rights.

3. Certiorari is warranted to resolve the conflicts among the circuits about whether persons involved in class actions can bring subsequent malpractice actions against their lawyers.

Nothing in respondents' briefs rebuts the existence of a conflict among the circuits on the question whether a court-approved class settlement bars individuals involved in that action from bringing malpractice claims against their lawyers. Respondents' assertion that the cases petitioners cite on this issue do not involve *Rooker-Feldman* or federal review of a state action is misleading. The Seventh Circuit's holding with regard to plaintiffs' malpractice claims is premised not on a *Rooker-Feldman* specific analysis, but on the more generic proposition that a finding of malpractice would contradict the court-approved settlement. It is this premise that has engendered substantial controversy in the circuits. Specifically, while some courts believe that a successful malpractice action need not disturb a court-approved settlement, *see Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3611 (U.S. Feb. 24, 1997) (No. 96-1364); *Zimmer Paper Products, Inc. v. Berger &*

Montague, 758 F.2d. 86 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985); *see also Diaz v. Sheppard*, 85 F.3d 1502 (11th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3665 (U.S. March 31, 1997) (No. 96-1004), others disagree. *See Laskey v. UAW*, 638 F.2d 954 (6th Cir. 1981); *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litigation)*, 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982). Even respondents concede that the proper resolution of this issue is "far from clear." Bank's Brief in Opposition, at 27.

In an era in which nationwide class actions abound and absent class members are far removed from the attorneys who purport to represent them, it is imperative that the rights and remedies of class members with respect to their attorneys be clarified. This case presents an important opportunity for this Court to do so.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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Dated: April 14, 1997